

E49BSCHM

Motion

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 ADRIAN SCHOOLCRAFT,

4 Plaintiff,

5 v.

10 CV 6005 (RWS)

6 THE CITY OF NEW YORK, et al.,

7 Defendants.  
8 -----x

9 New York, N.Y.  
10 April 9, 2014  
12:18 p.m.

11 Before:

12 HON. ROBERT W. SWEET,

13 District Judge

14 APPEARANCES

15 NATHANIAL B. SMITH

Attorney for Plaintiff

16 MICHAEL A. CARDOZO

17 Corporation Counsel for the  
City of New York

18 Attorney for City Defendants

19 BY: SUZANNA PUBLICKER METTHAM

20 SCOPPETTA SEIFF KRETZ & ABERCROMBIE

Attorneys for Defendant Steven Mauriello

21 BY: WALTER A. KRETZ, JR.

22 MARTIN CLEARWATER & BELL LLP

Attorneys for Defendant Jamaica Hospital

23 BY: GREGORY JOHN RADOMISLI  
24  
25

E49BSCHM

Motion

APPEARANCES CONTINUED

IVONE, DEVINE and JENSEN, LLP

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Dr. Isak Isakov

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Attorneys for Respondent Graham Rayman

BY: DAVID S. KORZENIK

MONA HOUCK

E49BSCHM

Motion

1 (In open court)

2 (Case called)

3 MR. KORZENIK: We're the new kids on the block. We  
4 represent the journalist Graham Rayman, who's subpoena is at  
5 issue today. I'm David Korzenik, K-O-R-Z-E-N-I-K, of Miller  
6 Korzenik Sommers on behalf of Graham Rayman.

7 MS. HOUCK: Mona Houck of the same firm. H-O-U-C-K.

8 THE COURT: And the City?

9 MS. PUBLICKER METTHAM: Suzanna Publicker Mettham with  
10 Corporation Counsel for City defendants.

11 THE COURT: Yes. I'll hear from the City.

12 MS. PUBLICKER METTHAM: Thank you, your Honor.

13 We're here today because during the course of  
14 discovery in this matter, we learned that Mr. Schoolcraft,  
15 plaintiff, and his father, Larry Schoolcraft, had provided  
16 certain documents to Mr. Rayman, who was then a reporter for  
17 the --

18 THE COURT: May I? Forgive the interruption, but this  
19 is not the only-- we've got another First Amendment. That's  
20 not your fault. I mean, well, it is your fault sort of that  
21 you got into this in the first place, but we've got another  
22 First Amendment issue. And I think it might be helpful-- I  
23 think the one thing that we should get established is the  
24 availability or unavailability of the materials which you  
25 seek.

E49BSCHM

Motion

1 And so if you would be kind enough and just go through  
2 what it is you want and why you think that-- I know why you  
3 think that the respondent has the materials, but if you'll just  
4 tell me the basis for your conclusion that the -- that  
5 Schoolcraft does not end it. Okay?

6 MS. PUBLICKER METTHAM: Yes, your Honor. So, for  
7 example, subpoena request numbers 5, 14 and 16, these are  
8 written statements of Mr. Schoolcraft. Number 5 especially, we  
9 learned that --

10 THE COURT: Yes, that's the statement at the time of  
11 the incident.

12 MS. PUBLICKER METTHAM: Yes, your Honor.

13 THE COURT: Yes, okay. But what is-- what did  
14 Schoolcraft say about that?

15 MS. PUBLICKER METTHAM: Mr. Schoolcraft said he had  
16 created this document and had given it to Mr. Rayman, but that  
17 he is no longer in possession of that document.

18 THE COURT: And he's testified to that?

19 MS. PUBLICKER METTHAM: He did, your Honor.

20 THE COURT: Okay. What's next? E-mails sent to  
21 Graham Rayman.

22 THE COURT: Right. The same thing?

23 MS. PUBLICKER METTHAM: Same thing. He no longer has  
24 access to those e-mails.

25 THE COURT: Okay. Next.

E49BSCHM

Motion

1 MS. PUBLICKER METTHAM: Recordings. Now, we have  
2 received a number of recordings in this case. The concern is  
3 that the book mentions a number of other recordings that we  
4 have not received and it mentions that plaintiff was in  
5 possession of thousands of hours of recordings, which we  
6 certainly have not received.

7 When we asked plaintiff and plaintiff's counsel about  
8 providing all documents, they stated that they had provided all  
9 that they were in current possession of. So to the extent that  
10 there are --

11 THE COURT: Just forgive me. Schoolcraft has  
12 testified that he does not have the recordings.

13 MS. PUBLICKER METTHAM: He has testified that he gave  
14 us all of the recordings he had.

15 THE COURT: That he has.

16 MS. PUBLICKER METTHAM: Yes.

17 THE COURT: And of course there is this issue about  
18 the fiddling around with the recordings. So you want--  
19 presumably you want to check that.

20 MS. PUBLICKER METTHAM: Yes, your Honor.

21 THE COURT: But he's given you everything he has.

22 MS. PUBLICKER METTHAM: Yes. Our concern is that in  
23 the book there are a number of recordings that are mentioned  
24 that are not on the recordings provided by plaintiff that lead  
25 us to believe that additional recordings were provided to

E49BSCHM

Motion

1 Mr. Rayman.

2 THE COURT: Okay. What's next?

3 MS. PUBLICKER METTHAM: Crime complaint reports.

4 These are the allegedly stolen report from plaintiff's  
5 apartment on February 31st, 2009. He stated in deposition that  
6 he does not have these documents because they were stolen from  
7 him. However, it sounds like crime complaint reports were  
8 given to Mr. Rayman by plaintiff after the incident.

9 Shall I move on?

10 THE COURT: Anything else?

11 MS. PUBLICKER METTHAM: Yes, there are more items just  
12 on that one.

13 THE COURT: Okay. I want to get your position about  
14 their unavailability.

15 MS. PUBLICKER METTHAM: So plaintiff has stated he  
16 does not have these documents because he has stated that they  
17 were stolen from him.

18 THE COURT: Right.

19 MS. PUBLICKER METTHAM: However, according to the  
20 book, these documents were produced.

21 THE COURT: Okay. But the plaintiff has testified  
22 that he does not have those reports.

23 MS. PUBLICKER METTHAM: Correct. Just one slight  
24 issue on this one, is that plaintiff did testify-- or, I'm  
25 sorry, strike that. That according to the book and to

E49BSCHM

Motion

1 newspaper articles, plaintiff had provided these documents to  
2 another reporter as well. So Mr. Korzenik has raised the  
3 question of whether they're unavailable if they were also given  
4 to another court reporter-- or, I'm sorry, another news  
5 reporter.

6 THE COURT: Another reporter.

7 MS. PUBLICKER METTHAM: Yes.

8 The next issue is memoranda written from plaintiff to  
9 the NYPD. There's a question about whether these documents  
10 have ever existed. Plaintiff testified that he wrote two  
11 memoranda to the former commanding officer of the 81st Precinct  
12 in 2006 and 2007. This detailed, according to plaintiff,  
13 misconduct that he was reporting and blowing the whistle.

14 The NYPD has undertaken an extensive review and has  
15 found no evidence that these memoranda were ever given to a  
16 member of the NYPD.

17 We have asked plaintiff to produce them and he has  
18 testified he is not in possession of these documents.

19 THE COURT: What makes you think Mr. Rayman has them?

20 MS. PUBLICKER METTHAM: Because they were mentioned in  
21 his book, described in the book.

22 Additionally, documents have been requested from Larry  
23 Schoolcraft, plaintiff's father. Larry Schoolcraft, the issue  
24 that we broached with your Honor at the court conference last  
25 month, testified that he had three copies in triplicate of

E49BSCHM

Motion

1 every document that Adrian Schoolcraft was given, but even  
2 though he was subpoenaed and the Court in the Northern District  
3 of New York ordered him to produce those documents, at his  
4 deposition he failed to produce them and has not produced them  
5 to date.

6 THE COURT: Has he stated that he doesn't have them?

7 MS. PUBLICKER METTHAM: He stated-- and I may ask  
8 Mr. Kretz to help me on this issue since I was not personally  
9 present for his deposition -- but that he's not sure whether he  
10 had them or not, but he could not access the garage in which  
11 the documents were being held, which--

12 MR. KRETZ: If I may, your Honor, at his deposition, I  
13 think it was in late fall, he said he did have those documents  
14 and they were in his garage. Walter Kretz for defendant  
15 Mauriello. And we then followed up and sought an opportunity  
16 to review those records.

17 We addressed it with your Honor and we arranged to  
18 have plaintiff and two of the defense counsel go to  
19 Mr. Schoolcraft's home and look at the records in the garage.  
20 When I called Mr. Schoolcraft to make that arrangement, because  
21 plaintiff's counsel said they didn't want to be involved in  
22 that process, Mr. Schoolcraft had told me he had cleaned out  
23 his garage for a six-month period prior to his deposition,  
24 didn't recall seeing anything in there, and threw away -- I  
25 forget what word -- truckloads full of things which he doesn't



E49BSCHM

Motion

1 think included any records and doesn't think there's anything  
2 left in his garage that would consist of copies of those  
3 records.

4 And so as far as he knows, nothing exists on his  
5 premises. And anything he once had was turned over to  
6 Mr. Schoolcraft, that is Adrian Schoolcraft's prior counsel,  
7 Jon Norinsberg.

8 So I've written to plaintiff's counsel to see if he  
9 could confirm that Mr. Norinsberg turned everything over to  
10 them and he has since turned over everything to us, and I still  
11 have no response to that question.

12 So we still don't know whether we've gotten everything  
13 they have or not for sure.

14 THE COURT: What do we do about that?

15 MR. SMITH: Nathaniel Smith for the plaintiff. I,  
16 too, spoke to Larry Schoolcraft, the father, and he told me a  
17 lot of things. But I want to just provide a little background  
18 for this because it's being presented in a way that is-- I  
19 think it's trying to paint the plaintiff in a negative way.

20 THE COURT: Look, all we're trying to find out is did  
21 he throw the stuff away?

22 MR. KORZENIK: He said yes, right?

23 MR. SMITH: What Larry Schoolcraft told me was not  
24 that he threw everything away, but two things: That he said in  
25 a recording somewhere, "Oh, they better not steal my son's

E49BSCHM

Motion

1 stuff because I've got three copies of everything." That was  
2 hyperbole. It was not really an accurate statement. But more  
3 importantly the thing that he did tell me was that when the  
4 case actually started, he did give information to Norinsberg,  
5 who was the lawyer who filed the case initially.

6 THE COURT: Right.

7 MR. SMITH: Now, that file has gone from Norinsberg to  
8 another law firm, Levine & Gilbert, and then it came to me.

9 THE COURT: And as far as you know, that is the file.

10 MR. SMITH: Yes.

11 THE COURT: And as far as you know, there is no such  
12 document of the-- there's no Schoolcraft documents. I mean  
13 documents that could be identified as Larry Schoolcraft's.

14 MR. SMITH: Yes, that's true. But, I mean, it's  
15 almost impossible to really discern some of this. There's  
16 nothing that says Larry Schoolcraft's files are in there.

17 THE COURT: Right.

18 MR. SMITH: I have --

19 THE COURT: Well, then let's back up. Let me ask the  
20 City, do you have-- you don't know-- or do you? Do you have  
21 any specific documents which I guess would apply not only to  
22 this file, which-- in other words, if I were to grant your  
23 motion to compel, what would you have the-- what would you have  
24 the author produce? I mean, unless he can identify-- you would  
25 say any documents he received identified as Larry Schoolcraft

E49BSCHM

Motion

1 documents?

2 MS. PUBLICKER METTHAM: I would ask for documents  
3 received from Larry Schoolcraft.

4 THE COURT: Okay.

5 MS. PUBLICKER METTHAM: Correct, your Honor.

6 THE COURT: All right. Okay. Anything further on the  
7 unavailability of those documents?

8 MS. PUBLICKER METTHAM: No, I believe that's it, your  
9 Honor.

10 THE COURT: Anything else?

11 MS. PUBLICKER METTHAM: No, your Honor. Thank you.

12 THE COURT: Yes.

13 MR. KORZENIK: If I may begin with just a brief  
14 comment about why we have opposed this motion.

15 THE COURT: I understand.

16 MR. KORZENIK: I think your Honor has dealt with these  
17 before.

18 THE COURT: Yes, yes. I understand, as best one can,  
19 I understand the law in this area, but I'd be pleased to hear  
20 anything you want to tell me.

21 MR. KORZENIK: Well, I won't give you a lecture on  
22 anything. It looks like you have a seminar on the First  
23 Amendment stuff up ahead with other cases. But the main thing  
24 I'd like to make clear is this was a hard story for Graham  
25 Rayman to report. It took a lot of work, a lot of footwork,

E49BSCHM

Motion

1 and a lot of trust with many different sources including the  
2 Schoolcrafts to get it. It was a tremendously important story  
3 for the City and beyond in terms of public policy issues, in  
4 terms of stop and frisk and so on. I won't bore you with that.  
5 But the most significant thing to this journalist is that he be  
6 able to speak to sources and have them trust him and not have  
7 them imagine that he will easily become a witness either  
8 against them or even for them.

9 We believe and we feel that if journalists easily are  
10 compelled to become witnesses or suppliers of data and  
11 information and documents to litigants, that this will impair  
12 their independence and their ability to get important stories  
13 of this kind. We do not wish to be a witness for either side  
14 and we do not wish to either help or hinder any of their cases.  
15 We wish to report, report important stories, as Graham Rayman  
16 did here.

17 So I'll leave it at that, but I think that the  
18 statement I made is consistent with the principle that the  
19 *Gonzalez* case in the Second Circuit expresses about why it is  
20 that even nonconfidential materials are to be protected when  
21 they are sought from journalists.

22 Now, we are mindful that the-- there are two groups of  
23 demands. One of them speak to particular documents that the  
24 City seems to believe exist or seems to think that our book  
25 refers to. Some of that is really quite overstated. For

E49BSCHM

Motion

1 example, the thousand hours of tapes that Schoolcraft  
2 supposedly took. All our book says is that Schoolcraft said  
3 that he took a thousand hours of tapes. That doesn't mean that  
4 we have them. What we most were concerned about was the roll  
5 call tapes. And we have, no doubt, some of them and have  
6 referred to those in the book.

7 What the City wants us to do, wants to be able to do,  
8 is to sift through our tapes to see if they've got all of them,  
9 to see if their collection is complete. They don't know  
10 specifically whether we have something that they don't have.  
11 They don't know what the tape might be that they're looking  
12 for. They just want to check completeness.

13 There's another issue here. What is the need for  
14 this? They themselves argued to your Honor at another motion  
15 that these things have very little to do with the case, the  
16 issue about stop and frisk and so on. The employment issues  
17 here that are active don't really relate to whether or not  
18 particular statements were made in the roll call.

19 There's a broader thing here that I think is  
20 problematic. When I read their motion to compel and I looked  
21 at their discovery, I couldn't really judge what specifically  
22 this case is about because they don't really connect up  
23 anything that they want with any particular cause of action nor  
24 any element of a particular cause of action. And what was  
25 amazing is that when I saw their reply to our papers, they

E49BSCHM

Motion

1 still don't do that even though we had established, and they  
2 understand, what the *Gonzalez* test really calls for.

3 Now, it's possible that some of the things that they  
4 seek may actually be things that are germane to a state cause  
5 of action, in which case New York State's shield law, which is  
6 a lot better than the federal privilege, would apply. But we  
7 don't know that. So what's happening in our blindness, in our  
8 uncertainty as to what cause of action it supposedly relates  
9 to, because they've never laid a predicate for that, we're sort  
10 of operating on the *Gonzalez* standard. But even on that weak  
11 standard, they've not stepped forward with anything  
12 informative.

13 So that if the standard is to tell us that the  
14 particular document sought-- they're not always particular as  
15 to what it is. It's just something. It could be a tape.  
16 There are a few particular things, but many of them are not.  
17 There's just general sort of groups of documents. They don't  
18 really know-- they have no idea whether the document exists in  
19 many cases. They have no idea what the documents contain in  
20 most of these cases. They have -- no specific or particular  
21 document is requested or identified often, except in one case,  
22 and no particular need is given. These particular documents  
23 are not identified to be valuable to a particular cause of  
24 action. None of them are ever named in either their motion  
25 papers or their reply papers or to even an element of those

E49BSCHM

Motion

1 causes of action. So we're still in the blind as to whether it  
2 applies to a state claim, in which my privilege is stronger, or  
3 to a federal claim or to both. They don't say.

4 Now, the other thing is-- here's what I think has  
5 happened. When I saw their reply and I realized what they're  
6 really looking for, what's happened here is they're kind of at  
7 the end of litigation discovery with all of the usual  
8 unhappiness that emerges at the end, discontent about what  
9 discovery has or may not have been given, and offense at what  
10 they think may have been withheld. People looking for grounds  
11 to impeach other people.

12 It's pretty clear from the reply that they're not  
13 talking about needing a document for a particular element of a  
14 claim. What they need it for-- I'll give you just in their own  
15 discussion the first thing in the reply, where they talk about  
16 the requests 514 and 16-- the statement, the one document that  
17 is the most specific is the one about the statement that Adrian  
18 Schoolcraft apparently wrote afterward. What they're looking  
19 for is an ability to impeach him.

20 Now, it struck me at the end, after I read this, that  
21 they're not really connecting it up with the case. What  
22 they're looking for is a way to show that Schoolcraft didn't  
23 turn over stuff he should have. Schoolcraft can be impeached  
24 on all these things and we want to be able to show that he's a  
25 liar.

E49BSCHM

Motion

1           For that reason, I want to put before the Court and  
2           note the Court to the Central Park Jogger case, where this  
3           issue, reporter's privilege, came before Judge Batts and  
4           Magistrate Judge Ellis made it clear that impeachment is not  
5           one of the significant issues in a case.

6           What's happening is that they're seeking documents  
7           that largely relate to satellite issues, that we all  
8           unfortunately suffer with at the end of litigations, but they  
9           don't relate to any core issue in the case. They don't relate  
10          to what *Gonzalez* says we have to show is a significant issue in  
11          the case.

12          And Judge Batts points out, and I think there's other  
13          cases that support it in the *McCray* case -- and I can give you  
14          a cite. We can give your Honor a copy if you wish -- *McCray*  
15          *Richardson Santana* litigation, and I can hand that up if your  
16          Honor wishes. But I realize at the end of all of this that  
17          this is really what this is all about. And I've sort of come  
18          to the end of seeing both their initial papers and their reply  
19          papers and to see that it's about sideshows. It's not really  
20          about something that is core to their needs.

21          The other thing that is troubling is that in the  
22          second half of their requests, and even the ones that they're  
23          more specific about, they're doing what *Gonzalez* says you  
24          can't. And whatever *Gonzalez* may say, the one thing that it  
25          really lays down pretty clearly is that you can't go sifting



E49BSCHM

Motion

1 through a journalist's files to see that you've got everything  
2 or to see if there might be something that might be useful to  
3 you. That's what they're really trying to do here.

4 It's most egregious in their request number 13 to 21,  
5 where they basically are shotgun requests that just say  
6 anything you got from Schoolcraft, anything, e-mails. They  
7 have no idea what these e-mails contain. They don't even know  
8 the Schoolcraft statement that he made.

9 And let's go back to that because it's an interesting  
10 one because it's the best one that I think they've got here.  
11 They don't know what it says, but now the question is, is that  
12 unavailable to them? And it's interesting. The courts  
13 flip-flop on some of this when it comes to videos and so on.  
14 But the interesting thing is that the question really is, is  
15 the information contained in that particular document or audio  
16 or video, is that information available to people by other  
17 means? And Batts treats it the way that I think it should go.  
18 Judge Jones did the same thing. And another case, I keep  
19 forgetting the name of it, but it's *United States v. Grant*.  
20 But the issue is not whether the particular tape is available,  
21 not whether the particular document is available, but whether  
22 the information in it is available by other means.

23 So now we have the Schoolcraft document in which he  
24 describes what had happened to him, but what happened to him in  
25 the hospital is something to which many, many witnesses were

E49BSCHM

Motion

1 exposed. Schoolcraft himself was there. A deposition is taken  
2 of Schoolcraft to find out what happens. Many doctors were  
3 present at different times. There are hospital reports  
4 presumably throughout. All of that is available through  
5 depositions and documents from the hospital.

6 Police officers were in and out of the this,  
7 overseeing and managing his-- how he was processed and moved  
8 through the hospital. All of those people are there and saw  
9 this. It's not as if you have a particular event that nobody  
10 else saw. So in that sense I think Batts is correct, Judge  
11 Jones is correct in the sense that they are analyzing it not  
12 from the point of whether the particular physical document is  
13 unavailable, but whether the information sought is available by  
14 other means.

15 So I would ask that your Honor consider it in that  
16 frame as well.

17 So there are a variety of other issues that I would  
18 point to. Some of this also, I think, is very cumulative.  
19 They already have a lot of this material by other means. The  
20 tapes, for example, of roll call, we don't really know whether  
21 they don't have a complete set. And so suppose they are  
22 missing one or two of them? How does that really have any kind  
23 of impact on this litigation? They have some. I suppose  
24 that's valuable, but I don't see how it really relates to a  
25 significant issue in this case. That was their burden. And

E49BSCHM

Motion

1 not only did they not show it, they didn't even try to show  
2 it.

3 I'll leave it with that and hope that maybe  
4 Ms. Mettham will raise some points and I can address those.

5 THE COURT: Thank you.

6 MS. PUBLICKER METTHAM: Thank you, your Honor. I'd  
7 like first to address Mr. Korzenik's argument that because  
8 there are pending state law claims, that a separate standard  
9 should be applied to them.

10 If your Honor reviews the case cited by Mr. Korzenik  
11 himself, *Von Bulow v. Von Bulow*, it argues that according to  
12 the legislative history of Rule 501, the senate report clearly  
13 states that it is intended that the federal law of privileges  
14 should be applied with respect to pendent state law claims when  
15 they arise in a federal question case.

16 It's the City's position that this is a federal  
17 question case. That is why we are here before your Honor in  
18 the Southern District of New York. While there are pendent  
19 state law claims, the focus here is a 1983 civil rights action.  
20 And according to the legislative history of 501, the state law  
21 claims should also have the federal privilege, journalist  
22 privilege, applied.

23 I would also take issue with Mr. Korzenik's argument  
24 that we believe that these issues don't really matter. He has  
25 misconstrued the City's position. What matters in this case is

E49BSCHM

Motion

1 whether and how Mr. Schoolcraft reported on his claims of  
2 misconduct within the NYPD.

3 While the City doesn't believe that a full  
4 investigation or mini-trials should be launched into each  
5 allegation of misconduct, whether and how Mr. Schoolcraft  
6 reported that misconduct is what's relevant to this case as  
7 Mr. Schoolcraft is alleging claims of retaliation.

8 In regards to the new cases cited by Mr. Korzenik,  
9 which were never mentioned in his opposition, such as *In re*  
10 *McCray*, in the *Graham* case, as they were not cited by Mr.  
11 Korzenik, I don't have a reply at this time. And if your Honor  
12 is going to rely on those, I would seek the opportunity to  
13 brief this new issue raised.

14 However, I would state that this really is not a  
15 sideshow. These are the relevant matters to plaintiff's claim  
16 which, by the way, is over four hundred paragraphs. Whether  
17 Mr. Schoolcraft-- if he created a document, which he says he  
18 did, contemporaneous with his confinement, in which he makes  
19 allegations which he later changes, I think that that is not  
20 just a sideshow; that is not just impeachment material. That  
21 goes to the heart of this matter, what allegedly happened.

22 And while Mr. Korzenik states that this evidence,  
23 including the statement written by Mr. Schoolcraft and these  
24 e-mails, are all just cumulative, to the extent City defendants  
25 have never received any of these documents, just

E49BSCHM

Motion

1 Mr. Schoolcraft's recollection, which was faded four years  
2 later, we don't believe this is cumulative. And at the end of  
3 the day, we don't have a single document that we've requested.  
4 So it's not that we have these already and we're seeking to see  
5 what Mr. Rayman has. We're trying to get the documents created  
6 and sent by the Schoolcrafts to Mr. Rayman.

7 And, again, I would also state that in terms of the  
8 deposition testimony, obviously there is a dispute between  
9 Mr. Schoolcraft and all of the defendants on what happened at  
10 that time. So there is no-- there's no overarching, clear,  
11 true factual account. This document we're seeking is to show  
12 how Mr. Schoolcraft perceived the events at the time of the  
13 incident and in e-mails following that and how he recorded the  
14 NYPD prior to his confinement.

15 Thank you, your Honor.

16 THE COURT: I'll reserve decision. Thanks very much.

17 MR. SMITH: Your Honor, may I have just one minute?

18 THE COURT: Yes.

19 MR. SMITH: I just want to state a concern of mine or  
20 stake out a position here. Because what I'm hearing is that,  
21 and what I believe is the case, is that Mr. Schoolcraft had  
22 some papers and he gave a lot of those papers, I think all of  
23 them, to his lawyer, but some of them actually may have been  
24 provided to Mr. Rayman, who did do extensive prelitigation  
25 research into what happened here and wrote thereafter many

E49BSCHM

Motion

1 articles which ultimately led to actually the filing of this  
2 case.

3 The only reason why I'm rising here is because I don't  
4 want anybody to say that the plaintiff took the position that  
5 these documents should not be turned over because I'm  
6 envisioning that the City in a trial would want to make an  
7 argument that there ought to be an adverse inference against  
8 the plaintiff because these documents, which are not  
9 available --

10 THE COURT: Well, thanks a lot. That's a trial issue.  
11 We'll deal with it. Right now we've got enough.

12 MR. SMITH: Okay. All right. I just wanted to state  
13 that. I don't have an objection --

14 THE COURT: That's fine. We'll struggle with that  
15 when it happens.

16 Okay. Thank you all very much. Reserve decision.

17 (Adjourned)

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